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No. 395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship "DENALI",
Petitioner,

—against—

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In presenting its petition for certiorari, petitioner makes at least four assertions of fact which are in square conflict with the findings of the Circuit Court of Appeals. The Circuit Court of Appeals found that the petitioner's vessel, which failed to carry respondents' cargo to destination, was not manned as required by a safety statute of the United States, in that her mates did not stand in three watches, and that a watch and watch system, or a two-watch system, was maintained on the "Denali", which required watch officers to stand alternating watches six hours on and six hours off 4

The safety statute violated by petitioner (46 U. S. C. §223) required that a vessel of the character of the petitioner's S. S. "Denali" should have a minimum complement of three mates who were required to stand in three watches, *i. e.*, four hours on the bridge for each watch—that is eight hours out of every twenty-four 8

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner fails to state accurately the findings of the Courts below, and the record as originally filed in this Court did not include all the evidence received by the Circuit Court of Appeals; hence a supplemental record has now been printed and filed in this Court, which contains that evidence (S. R.* 5661-5672). Nor did it include an order of the Circuit Court of Appeals modifying its opinion (S. R. 5676-5677).

The case involved the loss of respondents' cargo, shipped on petitioner's steamship "Denali" on or about May 16, 1935, at Seattle, to be carried by

* The Supplemental Record is referred to by the letters "S. R."

her as a common carrier to various ports in Alaska, for an agreed freight. She did not perform her contract and failed to deliver any of the cargo, which after the stranding of the "Denali" off Zayas Island, British Columbia, became virtually a total loss.

The District Court (U. S. D. C. for the Western District of Washington) found that the pilot and third officer of the "Denali", both of whom were acting as watch officers at the time of the stranding, although landmarks were visible, ran the "Denali" on a rock, which they knew was in her path, when all they needed to do to avoid this known danger was to stop the engines or to change her course to avoid this rock—Finding XI (R. 5458-5460), and that this negligence caused the loss. It held that the owners of the "Denali" were not liable for this negligence of the pilot and third officer, because Section 3 of the Harter Act (Act of Congress, February 13, 1893, Chap. 105, Sec. 3, 27 Stat. 445, 46 U. S. Code, Sec. 192) exonerated her owners from loss caused by the negligence of the ship's officers (R. 5460-5461). The District Court further found that the stranding occurred without the privity or knowledge of the petitioner (R. 5460).

The respondents appealed from this decision of the District Court to the Circuit Court of Appeals for the Ninth Circuit and assigned error because the proof showed that the petitioner had habitually disregarded a safety statute of the United States, enacted to prevent shipowners from maintaining unreasonably long hours of watch duty for ship's navigating officers. The statute required that the mates stand in three watches (Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733; Act of May 11, 1918, Chap. 72, §2, 40 Stat. 549, 46 U. S. Code, §223).

On the "Denali" the mates stood in two watches, watch and watch, and did not stand in three watches (R. 5614, 5628, 5633). Thus the mates were compelled to stand watch on the bridge for six hours at a time instead of four, and their rest period between each watch was shortened by two hours. Respondents contended that a violation of this positive mandatory statute, which was designed to prevent just such a disaster as that which occurred to the "Denali", constituted want of due diligence to make her seaworthy, and that, because exoneration under the Harter Act was conditioned upon due diligence to make a vessel seaworthy, the Harter Act did not apply. The respondents also appealed from the finding that the stranding was without the privity or knowledge of the petitioner, because petitioner was privy to the breach of the statute.

The Circuit Court of Appeals sustained the respondents in both these respects (R. 5622-5625).

Petitioner obtained a rehearing from the Circuit Court of Appeals, but after full new briefs (the petitioner's argument in connection with the rehearing alone occupied 282 pages of printed matter), the Circuit Court of Appeals adhered to its former decision (R. 5632-5651). Petitioner now seeks to have the case reviewed by this Court.

In presenting its petition for certiorari, petitioner makes at least four assertions of fact which are in square conflict with the findings of the Circuit Court of Appeals. The Circuit Court of Appeals found that the petitioner's vessel, which failed to carry respondents' cargo to destination, was not manned as required by a safety statute of the United States, in that her mates did not stand in three watches, and that a watch and watch system, or a two-watch system, was maintained on the "Denali", which required watch officers to stand alternating watches six hours on and six hours off.

To make out any case to present to this Court the petitioner apparently found it necessary to make the following assertions:

(1) "The three mates on the 'Denali' were divided into watches by the master" (Petition, p. 4).

(2) "The second and third mates serving 8 hours navigating duty each day in periods of 6 hours and 2 hours each, the third mate serving 6 hours from 12:00 midnight to 6 A. M. and 2 hours from 4:00 P. M. to 6:00 P. M. daily" (Petition, p. 4).

(3) "The first mate not only relieved the Master on his watches, but regularly did likewise with the pilot for short intervals" (Petition, p. 4).

On May 17 the first mate "stood a 4 hour watch alternating with the second and third mates and a 4 hour watch with the second mate; on May 18 he stood a 4 hour watch alternating with the second and third mates" (Petition, p. 4).

(4) The Circuit Court of Appeals arbitrarily found that the pilot was a substitute for the first mate (Petition, p. 5).

Each of these assertions is in the teeth of the findings of the Circuit Court of Appeals, findings which required consideration of a record of more than five thousand pages in length.

(1) The entire Court found that the three mates were not divided into three watches (R. 5614, 5628, 5633). The Court found that the master and pilot stood watch and watch and that the second mate assisted the master and the third mate assisted the pilot. Hence, there was a two-watch, not a three-watch system on the "Denali" (R. 5613-5617). The majority found that this was "by the act of the Company's management" (R. 5623). The minority found: "Their failure to comply with §2 was known to and tacitly, if not expressly, approved by appellee" (R. 5628). On rehearing the Court restated its findings: "Our findings disagreed with the district court with regard to the method in which the *'Denali's' owner* managed her with respect to the working hours of her navigating mates" (R. 5633).* "We found that the petitioning corporation owner of the 'Denali' was privy to the navigation of the vessel when wrecked, because it was by its regulation and established practice that the navigating mate in the maneuvers leading to the strand commanded the vessel while he was and had been violating the three watch requirement of the statute by standing 12 hours per day in navigating during the entire voyage" (R. 5633-4).

* Italics throughout this brief are our own.

This finding of the Circuit Court of Appeals makes inadmissible petitioner's assertion that the master divided three mates into watches. The *three* mates were never divided into watches, and the owner, not the master, was responsible for the watches on the "Denali".

(2) The Circuit Court of Appeals found that both the second and the third mate "each in fact stood more than 8 hours watch duty" each day (R. 5616).

In a footnote at page 4 of the petition it is said: "The conclusion of the Circuit Court of Appeals that the third mate exceeded 8 hours watch duty is unsupported by the evidence." Petitioner in making this statement apparently forgot the testimony of the master of the "Denali", which is quoted at length by the Circuit Court of Appeals in its opinion (R. 5615-5616). In addition to that testimony, petitioner forgot the following testimony: R. 1606-1618, 1865, 1874-77, 1884-87, 2144, 2215, 2218, 2226, 2278, 2334-6, 2339, 2342, 2346, 2410, 2412, 2426, 2427, 2443, 2466, 2468, 4453, 4458, 1569, 1739-43, 1841, 1842. All of this testimony supports the Circuit Court of Appeals.

(3) The Circuit Court of Appeals found: "The first mate stood no regular watch on the voyage in question and this was the custom on the Steamship Company's 19 vessels in the Alaska trade, though he occasionally relieved the Captain and second mate" (R. 5615). This finding was substantially the same as that of the District Court, which found: "In the Alaska trade the chief mate does not stand a regular watch at sea but does on occasion relieve the other watch officers" (R. 5476).

It also found that the first mate of the "Denali" did not act as a mate on the voyage (R. 5633). These

findings of the Circuit Court of Appeals are fully sustained by the evidence (R. 1331, 1332, 2156, 2163, 5476, 5477). Indeed, one of the reasons why the petitioner employed Pilot Obert, according to Superintendent Murphy, a former director of the petitioning corporation, was so "that the first mate can be relieved of his navigating duties" (R. 1452). Cleasby, the first mate testified that he stood "no regular watch". "In spare time" he "used to spell off the captain" (R. 2131).

(4) The finding of the Circuit Court of Appeals that the pilot was a substitute for the first mate was in no sense arbitrary. Indeed, the District Court made a like finding. It said: "That substitution of the master and pilot as watch officers for the chief mate may not be said to be a literal compliance with the statutory scale" etc. (R. 5477). Further, the District Court found: "Pilot Obert was in fact used as a pilot and as an additional watch officer" (R. 5476). Further: "Captain Healy, the master, and Captain Obert, the pilot, each did on the 'Denali' stand alternating watches of 6 hours on and 6 hours off, it being the practice (which was followed in this case) to substitute the master or pilot as watch officer in the place of the chief mate" (R. 5476). In view of these concurrent findings, it is, of course, unnecessary to cite passages from the testimony to support them. These concurrent findings make inadmissible the petitioner's statement that the Circuit Court of Appeals arbitrarily found that the pilot was a substitute for the first mate.

The safety statute violated by petitioner (46 U. S. C. §223) required that a vessel of the character of the petitioner's S. S. "Denali" should have a minimum complement of three mates who were required to stand in three watches, i. e., four hours on the bridge for each watch—that is eight hours out of every twenty-four.

The statute (R. S. 4463, amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733, amended by the Act of May 11, 1918, Chap. 72, §2, 40 Stat. 549, 46 U. S. C. §223), the pertinent parts of which are printed in the opinion of the Circuit Court of Appeals (R. 5611-5612), was an amendment of R. S. 4463, first amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733. This amendment which carried into the law the provision that the mates shall stand in three watches was known as the Hardy Bill. The Act was one of a series of statutes whereby Congress sought to promote safety at sea, by prescribing decent working conditions and hours of labor aboard steam vessels. Mr. Hardy, the father of the bill, in his address to Congress, sets forth the need for the legislation. In referring to the three-watch provision, Mr. Hardy said: "The officer while in charge of a watch is responsible according to law for the vessel's safe navigation," etc. He reviewed the evils which existed on American vessels resulting from long hours of watch duty, and while referring to defects in sight and hearing of watch officers, he said: "We are told that these defects are sometimes caused by long strain and overtaxing the physical powers." He cited with approval a letter from a ship's officer approving the carrying of "three officers, and each

takes his regular watch of four hours on the bridge—that is, 8 hours out of every 24" (Congressional Record, Vol. 48, Part XI, 62nd Congress, 2d Session, pp. 10687-10689). A reading of the testimony taken by Congressional Committees which led to this legislation, leaves no doubt that Congress was determined to abolish the watch and watch system which subjected watch officers to 12 hours duty in each 24 hour day, and to substitute therefor a three-watch system, *i. e.*, a system whereby a watch officer was to take a turn for four hours out of each twelve hours. In passing it may be observed that under the watch and watch system no watch officer ever had a period of uninterrupted sleep for as much as eight hours.

The Committee of the House of Representatives which considered the bill, was determined that no Local Inspectors should be permitted to relieve a shipowner from the *minimum mandatory scale* provided by the statute. It is stated in its report to Congress that the provisions of the Act constituted a minimum requirement and were made mandatory because the Committee believed that it was unsafe to leave with the Local Inspectors any discretion to go below the minimum scale. The Committee "deemed it necessary to guard against a vessel being by overpersuasion or influence or carelessness permitted to go to sea so poorly officered as to be unsafe herself and a menace to other vessels" (62nd Congress, 2d Session, 1911-1912, House Reports, Vol. 3, Report 648).

The last of the series of statutes designed to correct labor conditions at sea were 46 U. S. C. §673, as amended June 25, 1936, Chap. 816, §2, 49 Stat. 1934, and as amended June 23, 1938, Chap. 597, 52

Stat. 944. The first of these amendments provided for the three-watch system not only for firemen, oilers and water tenders, but extended it to coal passers, sailors and licensed officers, thus limiting all routine work as well as watch duty for licensed officers to eight hours per day. The second of these amendments, that of 1938, went further and extended the provision to the personnel of tugs and of vessels operating on the Great Lakes. Up to 1938 all of these provisions, both as to routine and watch duty, had been confined to seagoing vessels. Thus, by gradual steps the mandatory minimum provision as to eight hours a day has now been extended to all classes of marine work and to all classes of marine vessels; whereas at the time of the "Denali" disaster the eight hour day was limited to *watch duty* on seagoing vessels of more than 1000 tons, engaged in voyages of 400 miles or more. We mention this limitation because of the insistence in the petition and brief that the six hour watches on certain Pacific Coast vessels, on the Great Lakes and on tug-boats, was overlooked by the Circuit Court of Appeals and should have caused the Circuit Court of Appeals to regard six hours rather than four hours as a proper period for watch duty. The truth is that Congress always regarded both the Great Lakes and the tug-boats as special cases, and did not subject them to the three-watch requirement until the Amendment of 1938, so that they might continue with six hour watches. It is significant, however, that the statute was not so worded as to permit Pacific Coast vessels, even in daytime, to continue to use watches of six hours' duration. Congress nowhere excepted such vessels from the general operation of the law.

Nautical Meaning of the Word "Watch".

Petitioner criticises the Circuit Court of Appeals for the definition which it gave to the word "watch" (Brief, p. 6). The criticism was vigorously urged on rehearing. To meet that criticism, respondents collected definitions of the word "watch" from thirty or more American and English dictionaries and encyclopedias, and submitted them to the Circuit Court of Appeals. All of these definitions sustain the Circuit Court of Appeals in its statement that in Anglo-Saxon countries the word "watch signifies a period of four hours". The Oxford English Dictionary, Vol. 10, Part 2, under "watch" summarizes many authorities, beginning with the year 1585 and running down to 1908. It defines "watch" as a period of four hours.

"A Naval Expositor", at p. 183, by Thomas Riley Blanckley, published in London in 1750, states:

> "Watch—Signifies the space of four hours, because half of the ship's company watch and do duty in their turns, so long at a time, who are divided into two parts, the larboard, and the starboard watch."

The Century Dictionary and Encyclopedia, Vol. X —1913, under "Watch-Naut." says: "The period of time called a *watch* is four hours, the reckoning beginning at noon or midnight." See also Webster's International Dictionary and Funk & Wagnall's Practical Standard Dictionary. We were unable to find any American or English dictionary which specified a longer period than four hours as the length of a watch.

Four questions are presented to this Court by the petitioner. None of those questions are of sufficient importance to warrant a review by this Court.

The petitioner presents four questions to this Court as a basis for certiorari. It is submitted that these questions on analysis involve questions of fact, found against petitioner on a voluminous record, and issues on which there is no conflict of decisions between the circuits.

Question No. 1 deals largely with two questions of fact: (1) That the pilot was not acting as a substitute for the first mate, whereas both courts below found that he was so acting, and (2) that the third mate stood watch for eight hours only, whereas the Circuit Court of Appeals held that he did in fact stand watch for more than eight hours. In this question petitioner also criticises the Circuit Court of Appeals for interpreting the three-watch provision as limiting the watch period to four hours. This criticism is without substance. In so interpreting the statute the Court gave the statute the precise meaning as that given it by the Department of Commerce at the time when the three-watch provision was first placed in the statute, viz., R. S. §4463, as amended by the Act of March 3, 1913.

The first of these questions (Petition, p. 9) deals with findings of fact, viz., that the Circuit Court of Appeals erred (1) in applying the three-watch provision to the pilot (in other words, that the Circuit Court of Appeals was mistaken in its finding of fact that the pilot was a substitute mate—see *ante*, p. 7), and (2) in finding as a fact that the third mate stood watch for more than eight hours a day

(see *ante*, p. 6). This Court should not be burdened with either of these factual propositions.

The criticism directed at the Circuit Court of Appeals for interpreting the word "watch", used in §4463, as amended by the Act of March 3, 1913 (46 U. S. Code §223), as meaning a period of four hours, is without substance. As shown above, the Court in giving this interpretation to the Act merely applied the well established dictionary meaning of the word. In addition it gave the word the departmental construction which had been officially promulgated twenty-seven years ago:

> "This Bureau is in receipt, by reference, of your letter of the 16th instant, * * * concerning the interpretation of Section 4463, Revised Statutes, as amended, the specific question asked being whether or not it is necessary that the three mates required on ocean-going passenger steamers of over 1,000 tons must stand watches of equal length.
>
> In reply you are informed that my opinion is that under the provisions of Section 4463, as amended, the mates should stand in three watches, and not as was formerly the practice in the majority of instances, of watch and watch, with the same period of relief as of duty, that is to say, four hours on and four hours off; and the purpose of the law was to give further relief in watch duty, which would reasonably seem to be four hours on and eight hours off. * * *" (Letter of Supervising Inspector Hoover, dated May 6, 1913—See S. R., pp. 5661-5662).

The letter of Mr. Allan D. Jones, referred to by petitioner and printed in the Appendix to the peti-

tion, at p. V, which states that there had been no ruling on this subject, is not in the record. Unfortunately the letter was obtained by the petitioner *ex parte,* and apparently Mr. Jones's attention was never directed to the circular of 1913. In passing it should be observed that even if the petitioner's contention should succeed, that would not assist petitioner, because the Courts below have found concurrently that the mates did not stand in three watches (see *ante,* p. 5).

Question 2: Petitioner's Question 2 ignores the Congressional mandate prescribing a minimum scale for safe navigation of steam vessels. The Circuit Court of Appeals correctly decided that when a shipowner habitually permits his vessels to be navigated with a two-watch system, when Congress by statute had required a three-watch system for safe navigation, such failure to comply with the Congressional mandate constituted want of due diligence to make its vessel seaworthy. There is not any conflict of authority on this point.

The second question presented by the petition (Petition, p. 10) is, whether a violation of a statute designed to promote safety renders a vessel unseaworthy? Seaworthiness merely means safety for navigation at sea. Therefore, when Congress provides that for a vessel to be safe for navigation at sea her mates shall stand in three watches, a vessel which does not maintain such watches is unseaworthy. No other conclusion is possible unless it is permissible for a Court to substitute its judgment for that of Congress as to what constitutes safety for navigation at sea. Congress was unwilling to permit the Local Inspectors, who are seafaring men, to substitute their judgment for that of Congress (*ante,* p. 9). Certainly it never intended that

judges, who are not seafaring men, should substitute their judgment for that of Congress. It is well settled by decisions of this Court that when Congress prescribes for safe navigation a specified instrument, such as a foghorn, no substitute is permissible, although a Court may think the substitute just as good. *The Pennsylvania*, 19 Wall. (86 U. S.) 125; *The Martello*, 153 U. S. 64. The circumstance that the legislative mandate concerns the use of human beings, rather than mechanical instruments, does not alter the rule; for, as was said by Judge Hough in *United States* v. *Union and Dalzelline*, 1932 A. M. C. 1331, 1336: "It is a matter of common knowledge that safety in anything which requires human effort depends, in the last analysis, on the human being. A weary man is infinitely more dangerous than a defective pipe or an obscured light, because he is unfit to discover the unfitness of the inanimate object."

It has long been settled that to be seaworthy a vessel must be adequately manned with a crew "competent for their duties with reference to all the exigencies of the intended route". *The Lady Pike*, 21 Wall. (88 U. S.) 1, 15; *In re Pacific Mail S. S. Co.*, 130 F. 76, 82; *The Rolph*, 299 F. 52, 54. This duty rests upon a shipowner by the general maritime law.

The petitioner says that the present case conflicts with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Hartford & New York Transp. Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, 191. That case did not hold that a shipowner might disobey a positive mandate of statute and be seaworthy. The Court held as a fact that the charge of unseaworthiness which related to the crew was "unsupported by the evidence". The Court found as a fact that the crew performed all the

services required of it and that the crew was in fact entirely competent. *The Hartford & New York Transp. Co.* case cannot be pushed beyond this finding of fact. It is worthy of note, however, that the legal conclusion in that case, to the effect that a shipowner was entitled to the benefit of the Harter Act unless it was shown that his want of due diligence to make the vessel seaworthy did have a causal relation with the loss, was later squarely overruled by this Court in *May* v. *Hamburg-Amerikanische* (*The Isis*), 290 U. S. 333.

As was said by Judge Cardozo, while speaking for the Court of Appeals of the State of New York, in *Martin* v. *Herzog,* 228 N. Y. 164, at page 168:

> "We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway (Highway Law, sec. 329a). By the very terms of the hypothesis, to omit, wilfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform." (Italics are the Court's.)

The Circuit Court of Appeals in holding that there had been want of due diligence to make the "Denali" seaworthy, was supported by all of the authorities. As long ago as the case of *The Valentine,* 131 F. 352, 355, it was said:

> "* * * and if the owners approve, suffer, or connive at such custo. 1 or practice, such vessel is not properly manned, nor do the owners intend

that the initial equipment and crew shall perform the duties for which they are provided."

The decision of the Circuit Court of Appeals on this question was clearly correct and there is no conflict between the authorities.

Question 3: An habitual, or customary, failure to comply with a statute designed to promote safe navigation known to a shipowner, constitutes privity and knowledge. The only real question is one of fact, viz., did the petitioner habitually and customarily fail to comply with a statute designed to promote safe navigation? The Court found as a fact that the petitioner did habitually fail to comply with that statute, and was in privity in and had knowledge of the mate's navigation of the ship in violation of the safety act at the moment of her running at full speed on the charted reef. There is no conflict of authority on this point.

The question of fact thus raised by petitioner was decided against it in accordance with uncontradicted testimony of petitioner's own witnesses by the Circuit Court of Appeals:

> "The 'Denali's' owner's privity in and knowledge of the mate's navigation of the ship in violation of the Safety Act at the moment of her running at full speed on the charted reef are affirmatively established by the proof" (S. R. 5676).

This finding of fact should make further discussion under this heading unnecessary, especially as petitioner's third question is based upon the assumption that a customary violation of a safety statute does not justify a finding of privity and knowledge. In presenting this assumption, petitioner not only ignores the finding of the Circuit Court of Appeals which

we have just cited, but also the further finding that the failure to maintain a three-watch system was "by the act of the Company's management" (R. 5623), or, as put in the minority opinion: "Their failure to comply with §2 was known to and tacitly, if not expressly, approved by" petitioner (R. 5628).

The petitioner says that there is a conflict on this question between the decision below and the decision in *The Virginia*, 264 F. 986; *Hines* v. *Butler*, 278 F. 877 (which merely affirmed and adopted the view of the District Court in *The Virginia*); and *La Bourgogne*, 210 U. S. 95, 122. This contention is without foundation. It is nowhere held in either of these cases that, when a shipowner habitually permits a practice which necessarily results in disregarding a statutory minimum requirement for safe navigation, such shipowner is not in privity with the breach of the statutory mandate. In *The Virginia*, in order that its decision might not be misunderstood, the Court made specific reference to *Richardson* v. *Harmon*, 222 U. S. 96, in the following language:

> "But, as *Richardson* v. *Harmon* declares, there are neglects that will. Perhaps the owner cannot deny privity or knowledge, if the disaster happened in whole or in part because he more or less consciously took a chance or closed his eyes to something he did not want to be bothered about, or because in some other way he fell short of what a fair-minded, well-informed, and impartial man would feel was his moral duty in the premises" (264 F. 997).

The real question then is one of fact, viz., did petitioner do what "a fair-minded, well-informed, and impartial man would feel" should have been done, when

it habitually for many years sent each steamer of its fleet of nineteen vessels to sea, so manned that it knew that a safety statute of the United States would be violated? This question of fact has been decided against petitioner.

This Court, in *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370, directed attention to the fact that Congress regarded these safety statutes as of great importance, and in adopting statutory "watch" provisions had in mind providing a crew "competent and in a state of readiness 'for any exigency that is likely to happen'—such as a collision, the striking of the ship upon a reef of rocks or an iceberg, the sudden breaking out of fire, and other happenings of like disastrous tendency", etc. In other words, to hold otherwise than did the Circuit Court of Appeals, one must say that the very purpose of the statute may be ignored by a shipowner.

An examination of the record in *The Alameda* case (a case which involved another of petitioner's vessels —S. R. 5669) shows that more than twenty-five years ago—on May 24, 1913—the petitioner knew of the statute (R. S. 4463, as amended by the Act of March 3, 1913, Chap. 118, §2, 37 Stat. 733) and at that time it did provide three mates who worked four hours on and eight hours off during the trip leaving Seattle. The ruling was based upon the three mates standing "a regular bridge watch of four hours on and eight hours off" (S. R. 5671). During the intervening years, but still many years ago, the petitioner abandoned obeying the statute and permitted a practice to grow up where the pilot substituted for the first mate. Under that system, six hour watches—watch and watch—were maintained in utter disregard of the statutory mandate (R. 5617). Even if ignorance

of the law were an excuse, it is not an excuse when that ignorance is backsliding ignorance.

We submit that the finding below should not be disturbed. That finding is:

> "We found that the petitioning corporation owner of the 'Denali' was privy to the navigation of the vessel when wrecked, because it was by its regulation and established practice that the navigating mate in the maneuvers leading to the strand commanded the vessel while he was and had been violating the three watch requirement of the statute by standing 12 hours per day in navigating during the entire voyage" (R. 5633-34).

Nor is *La Bourgogne*, 210 U. S. 95, 122-127, in any way in conflict with the decision below. This Court, as did the Court in *The Virginia*, recognized that the question was really one of fact. At 210 U. S. 126, 127, this Court stated that the claimants in *La Bourgogne* had not properly sustained the burden which was on them in that case. The passage quoted at 210 U. S. 126 from the opinion of the Circuit Court of Appeals in *La Bourgogne*, conclusively shows that the decision in that case went off on the fact that the Court could "not find that the petitioner's officers knowingly tolerated or encouraged" a breach of a statutory mandate. Here the finding is that the petitioner did knowingly tolerate a breach of a statutory mandate designed to prevent loss of life and property.

There is no conflict of decision on this question, or other reason for burdening this Court by reason of anything contained in petitioner's third question.

Question 4: A. The rule in *The Pennsylvania* (*The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136) is not confined to collision cases. There are many cases which apply the rule to other than collision cases. Principle does not require that the rule be so confined. B. Nor is the rule in *The Pennsylvania* confined to questions of liability. When, as in the present case, the only excuse which a shipowner has for failing to deliver cargo is negligence of the ship's officers, and the shipowner is unable to show that such negligence was not the result of the shipowner's failure to conform to a statute of the United States designed to keep watch officers alert, then it cannot be said that the loss was occasioned without the personal fault or neglect of the shipowner. There is no conflict of authority on either of these points.

Question 4 relates to the application of the rule in *The Pennsylvania*, 19 Wall. (86 U. S.) 125, 136, which provides that when a vessel is in active violation of a statutory mandate at the time of a disaster then the burden is upon the owner of the vessel to prove that the failure to comply with the statutory mandate not only did not but could not have contributed to the disaster.

A. Petitioner contends that the Circuit Court of Appeals erred in applying the rule to a non-collision case.

The decision of the Circuit Court of Appeals is supported by cases from this Court, and from the Second, Third, Sixth, Seventh and Ninth Circuits, where the rule was applied in other than collision cases (R. 5636-5646). As long ago as *The M. M. Chase*, 37 F. 708, 713, Judge Addison Brown applied the rule to a statute of the State of Maine dealing with attachment of goods by a sheriff of that State, and in the other cases cited from this Court and

from the various circuits, the rule was applied to strandings—*Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, 422-3; *Flint & P.M.R. Co.* v. *Marine Insurance Co.*, 71 F. 210, 215; to a sinking—*The Material Service*, 1937 A.M.C. 925, 930; to striking a bridge—*Dorrington* v. *City of Detroit*, 223 F. 232, 246; and to striking a sunken vessel—*People's Coal Co.* v. *Second Pool Co.*, 181 F. 609, 611.

In *The Pennsylvania*, 19 Wall. (86 U. S.) 125, at page 136, this Court said that the reason for the rule was "to enforce obedience to the mandate of" safety statutes. With this reason in mind it is difficult to imagine a more appropriate case for the rule than that which is now presented to the Court. The "Denali" was run upon a rock while she was being navigated in violation of a statute enacted by Congress to prevent such a disaster. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370. If the rule is not to be enforced in a case of this character, the purpose of Congress will be frustrated. The rule was adopted to prevent that result.

Petitioner suggests (Brief, p. 26) that the rule was adopted because it was desired to reduce confusion which might result because the navigators of one moving vessel would not know what another moving vessel intended to do. He cites no judicial authority for this view of the rule, nor can any good reason be assigned for holding that the rule in *The Pennsylvania* should be so confined.

Petitioner says that we are mistaken when we say that the rule in *The Pennsylvania* was applied by this Court in the *Richelieu* case. This Court, however, took a different view from that of petitioner

in *Belden* v. *Chase*, 150 U. S. 674, at page 699, and in *The Martello*, 153 U. S. 64, at page 74. An analysis of the *Richelieu* case clearly demonstrates that the rule was applied to a stranding case (see the opinion of the Circuit Court of Appeals below (R. 5642-5643)).

The rule in *The Pennsylvania* did not originate in England, as is argued by petitioner. It originated in *Waring et al.* v. *Clarke*, 5 How. (46 U. S.) 441, 465, where this Court imposed a heavy burden of proof on a vessel which had failed to carry a signal light required by statute. Mr. Justice Wayne, who wrote the opinion in that case, reiterated what he had said in Circuit in *Bulloch* v. *The Lamar*, Fed. Case No. 2129:

> "Not carrying one or more signal lights, then, in the way required, *is the neglect of a proper precaution conducing to the safety of others.* Besides subjecting the captains and owners to the penalty of two hundred dollars, which may be recovered by suit or indictment, it will throw upon the owners of steamboats the burthen of proof, to show that collisions which may occur, under such circumstances, are not owing to such neglect. I would require from them the same proofs, under like circumstances, in the case of a boat being swamped by the swell of a steamer, made by her rapid passage through the water" (4 Fed. Cas. 658).

In passing it may be observed that damage from a swell is not a collision within the narrow maritime definition of "collision". Because in "its strict legal sense [the term] does not include the contact of

vessels with *rocks*, sunken obstructions, or other fixed structure" (*Lehigh & Wilkes-Barre Coal Co.* v. *Globe & Rutgers Fire Insurance Co.*, 6 F. (2d) 736, 740, quoting Spencer on Marine Collisions), petitioner seems to hold the view that the rule should not be applied in the present case.

If petitioner's argument that the rule in *The Pennsylvania* should be limited to collision cases is valid, then the term "collision" should not be restricted so as to exclude contact with a rock from that term.

The "Denali" ran upon a reef of rocks, a type of disaster which the statute was designed to avoid, while she was in actual violation of a mandate of Congress intended to avoid a happening of that disastrous tendency. As was said by the Circuit Court of Appeals:

> "By good luck the 'Denali', run by the navigating mate at full speed on a charted reef, held fast. Had she struck on a course slightly more to her right, her port side well might have been torn out by the easterly edge of the reef and the vessel quickly capsized with heavy loss of life to her passengers and crew in the strong cold currents of the Alaskan waters. It was on an Alaskan voyage that *The Princess Sophia*, 61 F. (2d) 339, also ran on a reef, with a total loss of sailors, passengers, cargo and steamer. In our opinion the three watch provision for mates is for the purposes of minimizing such danger to human beings as well as to prevent loss to cargo. The identical issue of presumption of causation would be presented had the widow of a drowned sailor been the appellant instead of the United States or any other cargo owner" (R. 5635).

The petitioner failed in the present case to introduce any evidence to establish that the disaster could not have been the result of weariness of the watch officers of the "Denali" (R. 5621). Clearly in such a case the burden of proof imposed upon the petitioner has not been met. The Circuit Court of Appeals correctly disregarded the so-called finding of the District Court to the effect that the negligence of the watch officer was the sole cause of the disaster. In doing so it applied the same reason as that used by this Court in *The Edwin I. Morrison*, 153 U. S. 199, 215. The dissenting judge below apparently failed to note the concluding paragraphs of this Court's opinion in the *Morrison* case.

Petitioner at pages 34 to 36 of its brief cites *El Sol*, 45 F. (2d) 852, 855, affirmed *sub. nom. Southern Pacific Co.* v. *United States* (C. C. A. 2), 72 F. (2d) 212, 214; and in a footnote at page 12 of the petition, there seems to be a suggestion that this last mentioned case is in conflict with the decision below. The *Southern Pacific* case is not in conflict with the decision below. Although it affirmed *El Sol*, it did not adopt the rule as to burden of proof laid down in that case. On the contrary, it adhered to its former decisions, *The Rambler*, 290 F. 791, 792; *The 84-H* (C. C. A. 2), 296 F. 427; *In re Liverpool, Brazil & River Plate S. N. Co.* (C. C. A. 2), 57 F. (2d) 176. In the first of these cases, the Court (Hough, *J.*, writing), held that after liability had been established "it remains for the petitioner affirmatively to show that it is entitled to limit in accordance with the statute" (290 F. 792). The Circuit Court of Appeals for the Second Circuit has no doubt as to the meaning of *Southern Pacific Co.* v. *United States*, because in the very recent case of *New York Marine No. 10*, 109

F. (2d) 564, 566, in speaking of a petitioner's failure to comply with the burden of proof as to the privity, it said: "it has not disproved its privity, which it must do to limit liability. *The Rambler*, 2 Cir., 290 F. 791, 792; *The 84-H*, 2 Cir., 296 F. 427, 432; *Southern Pacific Co.* v. *United States*, 2 Cir., 72 F. 2d. 212, 214." The rule is the same in other circuits. See *The Silver Palm* (C. C. A. 9), 94 F. (2d) 776, 777, where the authorities are collected.*

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* *Earle & Stoddart* v. *Ellerman's Wilson Line*, 287 U. S. 420, 425, cited by petitioner at page 36 of its brief, deals with exceptive language used in the Fire Statute, viz., "unless such fire is caused by the design or neglect of such owner". The Court held that this language throws the burden of proof on the cargo owner. The language in the Limitation Statute differs from that in the Fire Statute. It is:

> "SEC. 183. LIABILITY OF OWNER NOT TO EXCEED INTEREST. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, *done, occasioned, or incurred without the privity, or knowledge of such owner or owners*, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending" (R. S. Sec. 4283, 46 U. S. C. Sec. 183.)

The Courts uniformly, with the exception of the discredited *El Sol*, 45 F. (2d) 852, 855, discussed above, hold that such language throws the burden of proof upon the shipowner to establish that he is entitled to limit his liability. In the English Fire Statute the language is similar to that contained in the Limitation Statute, and the House of Lords held that the burden of proof was on the shipowner to show that a loss by fire happened without his actual fault or privity. *Lennard's Carrying Company* v. *Asiatic Petroleum Company, Ltd.* (1915), A. C. 705. In that case Lord Haldane said "that Mr. Lennard ought to have gone into the box and relieved the company of the presumption which arises against it that his action was the company's action" (1915 A. C. at p. 714). The situation in that case was strikingly like the one presented here, in that the shipowner has wholly failed to offer any evidence as to the physical condition of either Obert, the pilot, acting as first mate, or Lawton, the third mate (R. 5621, 5622).

B. Petitioner argues that because it was already liable for breach of contract, it should be permitted to limit its liability, although it was unable to show that its breach of a safety statute did not contribute to respondents' loss. The only excuse which petitioner offers for its failure to carry respondents' cargo is that its own servants were negligent. The Court found as a fact that petitioner had not been able to show that its violation of a safety statute, designed to prevent the very disaster which occurred, did not contribute to the negligence of those servants (R. 5621-5622, 5648, S. R. 5676). In these circumstances the petitioner cannot say that it was not privy to the failure of the "Denali" to deliver her cargo. If petitioner had seen to it that a three-watch system had been maintained, the watch officers of the "Denali" might have refrained from running her full speed on a rock which they knew was in her path. The Circuit Court of Appeals has found that the petitioner failed to meet the burden of proof thus placed upon it (R. 5622, 5634). So long as this possibility has not been displaced by proof, the petitioner fails to establish its right to limitation.

There is no conflict between the circuits as to the application of the rule in *The Pennsylvania* in such a case. See *The New York Marine No. 10*, 109 F. (2d) 564, where the Circuit Court of Appeals for the Second Circuit said:

> "The charterer is therefore in the same position as if it had no privilege of limitation, and is liable in full if it is held that the absence of a second deckhand was a cause of the accident. Since the absence has been found, and the lack is admitted to be a statutory fault, (see 46 U. S.

C. A. §§ 222, 362 and 405) it is *presumed that the fault is a contributory cause, and the petitioner must bear the burden of showing that it was not. The Pennsylvania,* 19 Wall. 125, 136, 22 L. Ed. 148; *The Albert Dumois,* 177 U. S. 240, 254, 20 S. Ct. 595, 44 L. Ed. 751; *Lie* v. *San Francisco & Portland S. S. Co.,* 243 U. S. 291, 298, 37 S. Ct. 270, 61 L. Ed. 726; *The Annie Faxon,* 9 Cir., 75 F. 312, 319; *McGill* v. *Michigan S. S. Co.,* 9 Cir., 144 F. 788, 795, certiorari denied, 203 U. S. 593, 27 S. Ct. 782, 51 L. Ed. 332; *The Suffolk,* 2 Cir., 258 F. 219; *The Fulton,* 2 Cir., 54 F. 2d 467, 469; *The Annie,* D. C., 261 F. 797, 799. This burden it has not met, for it is impossible to say that the other deckhand might not have been on duty instead of Costello on the morning of the collision, had there been two deckhands on board. *On the ground that the tug was undermanned, that the charterer was privy to the undermanning, and that this fault may have been a contributing cause of the collision, the denial of limitation to the operating charterer is sustained.*" (109 F. (2d) 564, at p. 566.)

The result reached below and in *New York Marine No. 10* is the same as in *The Petition of Diamond Coal & Coke Co.,* 297 F. 238 and 243 (affirmed by the C. C. A. 3 in 297 F. 246, certiorari denied 265 U. S. 595), where the Court held that a petitioner for limitation of liability must show absence of "privity or knowledge of any matter which might have caused the accident" (297 F. 244).

The petitioner relies upon language in *Capital Transportation Co.* v. *Cambria Steel Co.,* 249 U. S.

334, in which this Court commented upon a "too easy a finding of privity and knowledge" (Brief, p. 16), but petitioner has apparently overlooked what this Court said in response to a similar argument in *Cullen Fuel Co.* v. *W. E. Hedger, Inc.*, 290 U. S. 82 (at pp. 88 and 89), viz.:

> "The petitioner urges that the denial of limitation in cases like this will sweep away much of the protection afforded to ship owners by the acts of Congress. But this view disregards the nature of the warranty. The fitness of the ship at the moment of breaking ground is the matter warranted, and not her suitability under conditions thereafter arising which are beyond the owner's control. Compare *Armour & Co.* v. *Fort Morgan S. S. Co.*, 270 U. S. 253; *The Ice King*, 261 Fed. 897; *The Soerstad*, 257 Fed. 130."

Here, as in the *Cullen* case, the fitness of the ship is what the Court had in mind. It is submitted that a shipowner should not be allowed the extraordinary privilege of limitation (*The Maine* v. *Williams*, 152 U. S. 122, 132) when it habitually violates a safety statute and its ship is lost while she is in actual violation of such statute. Beginning with *Richardson* v. *Harmon*, 222 U. S. 96, 106, and continuing in *Pendleton* v. *Benner Line*, 246 U. S. 353, 356; *Luckenbach* v. *McCahan Sugar Co.*, 248 U. S. 139, 149; *American Car & F. Co.* v. *Brassert*, 289 U. S. 261, 264, this Court has uniformly held that for personal neglect there can be no limitation.

Petitioner argues that because the rule in *The Pennsylvania* was derived from England, and because the English by statute have abandoned the rule, we

should abandon it also. If any such argument is to be made, it should, of course, be presented to Congress and not to this Court.

The Decision Below Was Eminently Just.

Petitioner complains of the injustice of the decision below. This complaint is unfounded. Petitioner before allowing the "Denali" to engage in the dangerous navigation of Alaskan waters "was under obligation to assure himself by inquiries or by personal inspection" that the "Denali" "should not incur the hazard" (*Spencer Kellogg Co.* v. *Hicks*, 285 U. S. 502, 510) of striking a reef of rocks, the type of disaster the statute, which petitioner failed to obey, was intended to avoid. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367, 368, 370.

The Circuit Court of Appeals points out that a disregard of that statute was likely to bring about just such a state of physical unfitness as would cause the navigators of the "Denali" to fail in their duty (R. 5619-5622). The petitioner refrained, for reasons best known to it, from asking these men about their physical condition (R. 5621, 5622) and, indeed, from offering testimony on the general physical vigor of Pilot Obert, a man well past his middle age. "More significant, the Steamship Company did not ask Obert, its own witness, nor did he testify, whether or not he felt fatigued from his 12 hours of service as both pilot and mate in the preceding 24 hours—significant because every admiralty lawyer knows the heavy burden on his owner-client where a statutory command is violated in the navigation of its vessel" (R. 5621-5622).

In these circumstances we submit that the Circuit Court of Appeals could not avoid the conclusion that petitioner had not shown that the violation of the statute was not a direct or contributing cause of the disaster. It said:

> "Our holding was that it had not been shown that the violation was not such a direct or such a contributing cause" (R. 5634).

This result is necessary unless safety statutes designed to prevent disaster, such as occurred in this case, are to be permitted to become dead letters.

The petitioner has failed to show any conflict of decision or to present any important question of interpretation of Federal Statutes which should be decided by this Court.

The prayer of the petition should be denied.

Respectfully submitted,

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